

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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|                              |   |                          |
|------------------------------|---|--------------------------|
| EQUAL EMPLOYMENT             | : | 15-CV-04141 (MKB)        |
| OPPORTUNITY COMMISSION,      | : |                          |
|                              | : |                          |
| Plaintiff,                   | : |                          |
|                              | : | United States Courthouse |
|                              | : | Brooklyn, New York       |
| -against-                    | : |                          |
|                              | : |                          |
|                              | : | Tuesday, July 19, 2016   |
| UNITED PARCEL SERVICE, INC., | : | 10:30 a.m.               |
|                              | : |                          |
| Defendant.                   | : |                          |
|                              | : |                          |

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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT  
BEFORE THE HONORABLE MARGO K. BRODIE  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
BUFFALO LOCAL OFFICE  
6 Fountain Plaza  
Suite 350  
Buffalo, New York 14202  
BY: ELIZABETH FOX-SOLOMON, ESQ.

For the Defendant: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
NEW YORK DISTRICT OFFICE  
33 Whitehall Street  
5th Floor  
New York, New York 10004  
BY: NORA E. CURTIN, ESQ.

For the Defendant: GREENBERG TRAURIG  
500 Campus Drive  
Suite 400  
Florham Park, New Jersey 07932  
BY: WENDY JOHNSON LARIO, ESQ.

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1 (In open court.)

2 (Judge MARGO K. BRODIE is in the courtroom.)

3 THE COURTROOM DEPUTY: All rise.

4 The parties on EEOC versus UPS.

5 This is civil cause for oral argument in Docket  
6 Number 15-CV-4141, Equal Employment Opportunity Commission  
7 versus UPS, Inc.

8 Counsel, please state your name for the record.

9 MS. FOX-SOLOMON: Elizabeth Fox-Solomon for U.S.  
10 Equal Employment Opportunity Commission.

11 THE COURT: Good morning, Counsel.

12 MS. FOX-SOLOMON: Good morning.

13 MS. CURTIN: Nora Curtin, also for the Equal  
14 Employment Opportunity Commission.

15 THE COURT: Good morning, Counsel.

16 MS. LARIO: Good morning, Your Honor.

17 Wendy Johnson Lario, Greenberg Traurig, on behalf of  
18 defendant UPS.

19 THE COURT: Good morning, Counsel.

20 Please be seated and the parties may remain seated.

21 We are here today for oral argument on the EEOC's  
22 motion.

23 As I understand the papers that were submitted by  
24 the parties, it is either a motion to dismiss or a summary  
25 judgment motion, depending on how the Court construes it in

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1 view of the number of exhibits that were submitted with the  
2 motion. And the basis for the motion is the affirmative  
3 defenses raised by UPS, which is the failure of the EEOC to  
4 comply with their Title VII obligation to make a prompt  
5 determination of charges, the second argument that the claims  
6 are barred by laches, and the third, the alternative and third  
7 argument, is that the statute of limitation of 300 days prior  
8 to the filing applies.

9 Is that right? Counsel?

10 MS. LARIO: That's correct, Your Honor.

11 THE COURT: Okay. So, we are going to start first  
12 with whether this is a motion to dismiss or a motion for  
13 summary judgment.

14 I have 57 exhibits that were submitted by you,  
15 Counsel, on behalf of your client and there are a number of  
16 documents. I group them, basically, into five categories.

17 Charges brought by plaintiff and the charging  
18 parties. Discovery correspondence between the parties. Court  
19 filings and documents. Conciliation correspondence between  
20 the parties. And the various certifications and declarations  
21 of the various UPS employees.

22 So, while some of these documents I can consider on  
23 a motion to dismiss, I do not see how and why I can consider,  
24 for example, the certificates and declarations of the various  
25 UPS employees, and a lot of other matters.

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1           So, I am inclined to treat this as a motion for  
2 summary judgment, rather than a motion to dismiss. But  
3 Counsel, I will let both parties tell me whether or not --  
4 although, I do not believe there is any objection to this in  
5 view of the fact that you alternatively moved for summary  
6 judgment, and the EEOC did not really object but, in fact,  
7 filed documents outside the pleadings.

8           So I assume the parties okay with having this matter  
9 treated as summary judgment motion.

10           MS. LARIO: Your Honor, you're correct. We do not  
11 object to this being treated as a motion for summary judgment.  
12 However, just to address briefly those documents that you  
13 identified as you believe being outside the scope of a motion  
14 to dismiss, particularly, the certifications of certain UPS  
15 employees. Those were known to the EEOC and in the EEOC's  
16 possession for many years. This was not a surprise. These  
17 are facts and averments that were clearly known and understood  
18 by them, and probably even incorporating in the context of  
19 some of the allegations that they made or the considerations  
20 that they made in making the pleading here.

21           So, while we do not object to this being a motion  
22 for summary judgment, we do believe that still, those  
23 documents, may still allow us to argue a motion to dismiss.

24           THE COURT: So, I disagree with that argument.

25           In reviewing the case law on what can be admitted

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1 and why, you made the arguments generally. You did not really  
2 specify which documents you thought were integrated and which  
3 could be incorporated by reference.

4 So, I believe a number of documents here are  
5 incorporated by reference and could be considered on a motion  
6 to dismiss, including all of the charging documents and the  
7 commissioner's letter with regard to its determination, and  
8 notice after conciliation fails.

9 With regard to documents integrated, some things can  
10 be considered there, also, but I believe the fact that EEOC  
11 had these documents in its possession, in and of itself, the  
12 case law is telling me is not sufficient. They must have  
13 relied on them in some way in drafting the complaint, and a  
14 lot of these documents they did not. A lot of these documents  
15 actually go to the laches argument, and so I believe they  
16 cannot be properly considered on a motion to dismiss.

17 So, I am going to convert it to a motion for summary  
18 judgment, and hearing no objection from EEOC -- you are  
19 shaking your heads no, Counsel?

20 MS. FOX-SOLOMON: Yes, no objection from EEOC.

21 THE COURT: Okay.

22 So, I am going to move on to the first argument with  
23 regard to why the complaint here should be dismissed.

24 Give me one second.

25 (Pause in the proceedings.)

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1 THE COURT: Okay. So turning to the affirmative  
2 defenses, the first is the unreasonable delay.

3 Counsel, do you want to be heard further?

4 MS. LARIO: Your Honor, briefly. I guess on the  
5 failure to make a prompt determination and required by  
6 Title VII.

7 The EEOC is required to make a prompt determination  
8 on reasonable cause and as so far as practicable, not later  
9 than 120 days.

10 Now, the EEOC's argument is that 120 days is not a  
11 requirement, and we don't disagree with them. But there is a  
12 requirement that the EEOC does make a determination on  
13 reasonable cause as promptly as possible. And while I believe  
14 these two arguments that we have is failure to make a  
15 determination promptly, as well as the latches argument, are  
16 really predicated on the same issues and timelines and events  
17 here.

18 Let me just say from the Abdullah charge, which was  
19 filed on January 13th, 2006, until the determination on  
20 June 29th, 2012, over six-and-a-half years expired, and under  
21 no circumstances has the EEOC explained, or even attempted to  
22 qualify or justify that time period with respect to the  
23 Abdullah charge.

24 With respect to Mr. Farhan's charge on April 27th,  
25 2007, and a determination was made on June 29th, 2012. Five

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1 years and two months expired, and again, the EEOC has not  
2 tried to explain or clarify or justify that time period.

3 THE COURT: Can I ask you a question, Counsel, with  
4 regard to that.

5 Why is it that the fact that in March of 2006 -- so,  
6 shortly after receiving the first charge by Mr. Abdullah --  
7 requested information from UPS for a nationwide review. Why  
8 does that not indicate that, in fact -- and ultimately that is  
9 what they did, they filed one charge -- that the agency was  
10 looking at the nationwide practice to try to determine whether  
11 or not they should bring a case on a nationwide basis, instead  
12 of simply determining the individual charges.

13 MS. LARIO: The EEOC did serve us with broad-based  
14 discovery in the Abdullah charge. We propounded discovery in  
15 connection with Mr. Abdullah and the Rochester, New York,  
16 facility as which he worked.

17 There were later objections where they clarified  
18 that they wanted nationwide discovery, and at that point, we  
19 objected and, as you know, when we objected and a subpoena was  
20 ultimately filed, and an order was sought by the EEOC, the  
21 Western District of New York agreed with us; that the scope of  
22 the EEOC's request was overly broad. And while that was  
23 certainly later reversed, for a period of about go  
24 two-and-a-half years there was an understanding here that this  
25 scope of that discovery was unreasonable.

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1           And frankly, that discovery had nothing to do with  
2 Mr. Abdullah, who was an applicant for a seasonal  
3 driver/helper position in one facility.

4           THE COURT: Understood. But as the agency charged  
5 with investigating these matters, in view of the fact it  
6 received that complaint, and then a subsequent complaint in  
7 2007, which did allege pattern and practice, why is it  
8 unreasonable for them to look at what UPS was doing across the  
9 country, and ultimately render one determination instead of  
10 individually adjudicating each of those claims? Because that  
11 is the argument you are making; that they should not have done  
12 that, they should have dealt with that charge separately, and  
13 they should have dealt with Farhan's charge separately, and  
14 delaying that and making it one determination, ultimately, is  
15 prejudicial to your client and that goes to the other  
16 argument.

17           But in the context you are saying that is what was  
18 unreasonable, that they should not have done that. They  
19 should have just dealt with them through individual charges.

20           MS. LARIO: Yes, Your Honor, because both Abdullah  
21 and Farhan brought individual claims. There was no pattern or  
22 practice allegation. There was no allegation involving any  
23 other employee, other than themselves.

24           These are individualized claims that the EEOC was  
25 investigating. They weren't charges that were brought by the



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1 EEOC.

2 THE COURT: I understand that.

3 MS. LARIO: And there is no allegation of pattern  
4 and practice, no notice to UPS.

5 THE COURT: But my question to you is, if they have  
6 gotten two complaints, or even if it was only one, and they  
7 decided, as you know they did because they requested  
8 nationwide discovery, to do a nationwide review of UPS's  
9 practice, because of the policy, there is a policy in place  
10 and it was the policy that was at issue here.

11 And so, why is it that it is unreasonable for them  
12 to take those steps and to combine all of these  
13 investigations?

14 MS. LARIO: Because I think what Title VII requires  
15 the EEOC to do, is to make a prompt determination on an  
16 individual's charge. And the EEOC had full knowledge of  
17 everything they needed to know to make a determination about  
18 Mr. Abdullah by May 5th, 2006, when we propounded all of the  
19 discovery related to him. They could have made a  
20 determination on that.

21 And for Mr. Farhan, they have never propounded  
22 specific requests for information, yet we provided a  
23 declaration in December of 2007, and they had everything that  
24 they needed from us with respect to Mr. Farhan's charge.

25 THE COURT: No, I get what you are saying, that they

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1 could have. The question is, why is it within their  
2 discretion to decide not to, and to delay making that decision  
3 in view of the their broader investigation, and in view of the  
4 commissioner's charge that was filed in 2008?

5 MS. LARIO: And I guess if we were talking about a  
6 year or 18 months, that would be one thing; but six-and-a-half  
7 years, and five years and two months? That's a long time.

8 And as you know, this goes to our laches argument,  
9 not one of the witnesses that we have with respect to those  
10 charges is employed by UPS any longer.

11 THE COURT: Well, I mean --

12 MS. LARIO: It's a long period of time.

13 THE COURT: But Counsel, you will admit that a big  
14 portion of that time was spent in litigating whether or not  
15 you should be required to provide nationwide discovery. You  
16 opposed it, and so that was litigation not just before the  
17 District Court, but the Second Circuit, and further litigation  
18 when it came back.

19 So, while you say that, which is true, if I exclude  
20 all of that time, aren't we really talking about two years,  
21 maybe two-and-a-half years?

22 MS. LARIO: No, we're not. Not with respect to  
23 Abdullah and Farhan.

24 With respect to the commissioner's charge we are,  
25 but not with respect to Abdullah and Farhan.

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1 THE COURT: But the requests for information that  
2 you opposed, the subpoena, was with regard to Abdullah's  
3 charge.

4 MS. LARIO: And --

5 THE COURT: And that is what was litigated. So  
6 there is no question that the delay, even as to that, had to  
7 do with the litigation.

8 MS. LARIO: Certainly, there was some gap in time  
9 due to the litigation on that; but employers have the right to  
10 object to the scope of discovery before the EEOC, and we  
11 rightfully took our steps or took the right steps to object.

12 THE COURT: And I am not suggesting otherwise; but  
13 all I am saying is, why should that time period be held  
14 against the EEOC? You have the right to object, and you used  
15 that right, but then why should I then look at that time  
16 period and hold it against the fact that the -- well, count it  
17 words, the time period during which the EEOC did not render a,  
18 decision, as you said, in order for it to be reasonable.

19 MS. LARIO: Again, Your Honor, I don't think that  
20 that time period is relevant to either of the charges for the  
21 individuals.

22 THE COURT: But I do not know how --

23 MS. LARIO: Investigation stemmed from those  
24 charges.

25 THE COURT: But I do not see how you can make that

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1 argument in view of the fact that the requests for  
2 information, and the subsequent subpoena which you objected to  
3 and opposed, was a result of the charge that was filed by  
4 Abdullah.

5           Regardless of whether you think it was with merit  
6 for them to seek nationwide information, based on that one  
7 charge, that is what they did. That is what was litigated.  
8 And so, that time period has to be attributed to that charge,  
9 also.

10           MS. LARIO: Your Honor, I guess we respectfully  
11 disagree, only because we believe that once the EEOC has all  
12 of the information that it needs -- and it was clearly going  
13 outside of Abdullah to look for other claimants, to look for  
14 other instances of policy violations.

15           THE COURT: But that is its right as an agency.

16           MS. LARIO: Agreed. Agreed.

17           But it had the ability to make a determination on  
18 Abdullah as of May of 2006, and again, what the statute  
19 requires is it should not be -- the EEOC should not be going  
20 on an investigation expedition, when it has the ability and  
21 the right to make a prompt determination for an individual who  
22 is brought a charge before it. And there, I think, is where  
23 they went wrong.

24           THE COURT: Okay. Thank you, Counsel.

25           EEOC?

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1 MS. FOX-SOLOMON: Yes, Your Honor.

2 With respect to the 100-day requirement for  
3 completing an investigation, I'm glad that Counsel has  
4 conceded that that is not, in fact, a statutory requirement.  
5 Title VII requires only that the investigation be done as  
6 promptly as possible, and so far as practical between within  
7 120 days.

8 And here, even with respect to Abdullah's charge,  
9 the first charge we received, the EEOC could not have  
10 completed its investigation within that period of time, given  
11 the timeline in which we received information from UPS. So  
12 that indicates that it is not practicable in this case.

13 With respect to the concept of whether we should  
14 have treated the Abdullah charge and the Farhan charge as  
15 individual investigations, rather than a systemic  
16 investigation, the end result would have been the same. Had  
17 we issued a determination with respect to Abdullah, and then  
18 done the same thing with respect to Farhan, we would have  
19 sought nationwide policy changes because the policy that we  
20 found problematic in both of those cases is nationwide and  
21 applies to all UPS facilities.

22 So, we would be back here having three separate  
23 investigations, three separate conciliations, and potentially,  
24 three separate lawsuits litigating the same policy.

25 THE COURT: But I guess what Counsel is arguing is

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1 that it was unreasonable for you to delay as to those  
2 individual charges. So, even though you may have sought the  
3 same result, and we may be in court litigating them, that you  
4 would have been litigating them sooner rather than later,  
5 because there was no reason why you could not decide the  
6 Abdullah and the Farhan charges properly while -- and Counsel  
7 is suggesting shortly after those charges were filed, so that  
8 you would not be here all these years later dealing with the  
9 broader issue, and those two individual charges.

10 MS. FOX-SOLOMON: Sure. And as, Your Honor  
11 mentioned earlier, it is within the EEOC's discretion to  
12 determine how they are going to investigate a charge, and in  
13 this case the Supreme Court has said time and time again, an  
14 individual charge does not limit the scope of an EEOC  
15 investigation. It simply provides a jurisdictional  
16 springboard for the EEOC to investigate any unlawful  
17 employment practices that it uncovers during the investigation  
18 of an individual charge.

19 So, here, based upon our investigation of the first  
20 charge, the Abdullah charge, we determined that there was an  
21 unlawful policy here, and that's why we sought the nationwide  
22 information, ultimately the nationwide relief.

23 With respect to Mr. Farhan, his charge, contrary to  
24 what Counsel represented, his charge does include pattern or  
25 practice language. His charge specifically says, this is

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1 Exhibit 2 to defense counsel's affidavit. I also believe that  
2 respondent has a pattern or practice of refusing to  
3 accommodate the religious observances, practices, and beliefs  
4 of its employees.

5 So, as of April 2007, we had an individual who was  
6 also charging pattern or practice allegations, and we had an  
7 obligation to investigate that.

8 UPS did not even provide a position statement with  
9 respect to Mr. Farhan's charge. So when they say we didn't  
10 request any information with respect to his charge, they  
11 didn't even provide the first step, which is, we ask an  
12 employer for a position statement.

13 They ignored the Farhan charge because they were  
14 litigating the issue of the subpoena, which is both  
15 Mr. Abdullah and Mr. Farhan. It was not restricted to  
16 Mr. Abdullah.

17 THE COURT: Okay.

18 MS. LARIO: So, Your Honor, I think what the -- what  
19 I am hearing here, too, is the EEOC has a lot of discretion;  
20 right? We all know that, and they have a right to file a  
21 commissioner's charge, which they also did here.

22 If they were actually going after the policy as  
23 early as Mr. Abdullah's charge, and prior to Mr. Farhan's  
24 charge, they had the right and the ability to bring an EEOC  
25 commissioner's charge, and to make a prompt determination with

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1 respect to the charges of these two individuals so that we  
2 were not battling this issue of nationwide discovery on the  
3 scope of the policy, and instead, focusing on and dealing with  
4 the witnesses and the issues for Mr. Abdullah in New York and  
5 Mr. Farhan in Texas.

6 THE COURT: But wouldn't these witnesses be relevant  
7 also to any commissioner's charge or a nationwide charge that  
8 ultimately the EEOC would bring?

9 MS. LARIO: Frankly, I don't even know. I can tell  
10 you that the discovery that we produced ultimately in this  
11 case had approximately 300 applicants, and approximately 50  
12 employees who requested accommodations. I do not believe that  
13 there were any other employees who went through the  
14 accommodation process that were in the Rochester facility.

15 So, I don't know that there are overlaps, or that  
16 these witnesses would have been relevant, but it certainly is  
17 a potential that they would have been relevant to the broader  
18 case.

19 THE COURT: Okay.

20 Why don't you make your laches argument.

21 MS. LARIO: Thank you, Your Honor.

22 So, in the laches argument, we have to problems to  
23 meet. We understand that this is an affirmative defense.

24 It's our obligation to demonstrate that the EEOC engaged in  
25 unreasonable delay, and that there was associated prejudice



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1 based upon their conduct.

2 So, with respect to the unreasonable delay here,  
3 what we tried to do is help the Court by giving the Court kind  
4 of a timeline here. But if I may, just look back at some of  
5 the -- if we break it down into the investigation, and I  
6 think, Your Honor, I want to make one point clear.

7 When we're making this laches argument, we are not  
8 including the time that the parties were engaged in the  
9 dispute over the scope of the discovery. We are really  
10 focusing on the actual delays that were associated with the  
11 EEOC's conduct.

12 THE COURT: So, you are excluding 2006 through 2009?

13 MS. LARIO: We are excluding and, Your Honor, I  
14 would say that we are excluding from the request for  
15 information for nationwide discovery, which was issued to us  
16 on March 2nd, 2007, in the Abdullah case.

17 THE COURT: Well, no. But the one that you fought  
18 was the request dating back to the 3/22/2006 request as to --

19 MS. LARIO: The one we fought is over the  
20 subpoena --

21 THE COURT: Go ahead.

22 MS. LARIO: What we were actually fighting over was  
23 the EEOC subpoena, which wasn't issued until July of 2007.

24 THE COURT: Right. But the only reason that was  
25 issued, was because of the fact that they issued the request

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1 on March 22nd of 2006, did not get any response or did not get  
2 the proper response, and then, ultimately, issued the  
3 subpoena.

4 That is my understanding. Where am I wrong,  
5 Counsel?

6 MS. LARIO: Your Honor, you're right. They issued a  
7 request for information in the Abdullah charge on March 22nd,  
8 2006. We responded on May 5th of 2006. And it wasn't until  
9 the EEOC sent us a letter on August 18th, 2006, saying that  
10 they were asking, clarifying that they were asking for  
11 nationwide discovery. At that point we objected and go from  
12 there.

13 So, I guess, actually, if we want to go from that  
14 date, the August 18th, 2006, that was the first time the EEOC  
15 clarified for us that they were actually looking for  
16 nationwide discovery.

17 THE COURT: But their argument is that that was  
18 clear in the request for information.

19 MS. LARIO: I guess, Your Honor, whether we're  
20 talking about August or March, yes. I guess we're talking  
21 about a number of months here.

22 But I think it was not clear to us whether or not it  
23 was nationwide discovery. In many of these cases, we respond  
24 based upon the individual charge as well as the -- and  
25 remember, Mr. Abdullah was an individual charge. There was no

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1 information about pattern and practice.

2 So, not only did we respond about Mr. Abdullah, we  
3 gave them information about the facility. We expected that  
4 was sufficient as it is in most cases. So, it really wasn't  
5 until the EEOC notified us in August of 2006, that we had any  
6 notice that they were seeking nationwide discovery here, or  
7 that this was broader than Mr. Abdullah.

8 THE COURT: Okay. So, even if I were to accept  
9 that, then that would start from August of 2006, and that  
10 would have to continue at least through the Second Circuit  
11 opinion.

12 MS. LARIO: I would agree with you, Your Honor. So,  
13 we can take out that time period, and we are not arguing that  
14 time period here.

15 THE COURT: So, you are arguing as of 2010.

16 MS. LARIO: No, as of November 19, 2009, was the  
17 Second Circuit reversal and remand.

18 THE COURT: But didn't you object again in  
19 February of 2010?

20 MS. LARIO: We did not, Your Honor. We waited for  
21 the Western District on the remand order. That's all we were  
22 doing, Your Honor.

23 There was a reversal and remand to the Western  
24 District. Western District didn't issue an order on remand  
25 until March of 2010.

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1 THE COURT: Why did you need that?

2 MS. LARIO: Your Honor, because the reversal and  
3 remand gave the Court -- gave their instructions to the  
4 Western District to follow through.

5 THE COURT: Right. But it was clear at that point  
6 that you had to provide the information, is what I am saying.

7 MS. LARIO: I guess, again, it was not clear,  
8 necessarily, what the Western District was going to do, based  
9 upon the Second Circuit decision.

10 THE COURT: Was there any question that they would  
11 disagree with the Second Circuit finding and not ask that you  
12 provide this information?

13 MS. LARIO: Your Honor, it wasn't clear based upon  
14 the prior order what the Western District would do, and we had  
15 the right to wait for their order on remand, as any litigant  
16 would.

17 THE COURT: And again, I am not disagreeing with  
18 you. But then when we are talking about whether or not delay  
19 is reasonable or unreasonable, this becomes relevant as to  
20 whether a certain time period gets counted against EEOC.

21 And so, if the argument is the Second Circuit  
22 reversed the District Court in November of 2009, but either  
23 because the District Court did not take any action until  
24 February, or whenever it issued the order that you needed to  
25 comply with, I cannot hold that against the EEOC as being

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1 unreasonable in their delay in acting here.

2           So, that is what I am trying to get at and that is  
3 why I am suggesting that that puts us into 2010, as to the  
4 time period from which we need to start counting the time  
5 attributable to the EEOC with regard to any delay.

6           MS. LARIO: So, if we went from August of 2006, to  
7 March of 2010, that's approximately three-and-a-half years, if  
8 my math is correct, and you should check it, because my math  
9 is not he have very good.

10           THE COURT: I think we are all in the same boat on  
11 that, Counsel.

12           MS. LARIO: All right. So let's put that aside.

13           THE COURT: Right.

14           MS. LARIO: All right. And again, I think the Court  
15 is obligated to look at the Farhan charge, the Abdullah charge  
16 and the commissioner's charge independently. Because these  
17 were individual charges that were filed, separate parties that  
18 were filing them, and while Mr. Abdullah and Mr. Farhan have  
19 now been incorporated into the commissioner's charge, they  
20 clearly filed their independent charges at the earlier time  
21 periods.

22           So, with respect to Mr. Abdullah, if we take out the  
23 three-and-a-half years, we get from the date of his charge  
24 through the deliberations to this lawsuit, eight years and  
25 three months, okay?

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1 And if we deduct the three-and-a-half years from  
2 that.

3 THE COURT: Okay. I am not doing the math that way.  
4 I am starting with March of 2010, and moving from there, since  
5 we have excluded everything else up until then.

6 MS. LARIO: Well, we have to go back to his charge  
7 date, right? His charge date was January 13th of 2006.

8 THE COURT: Right. But then the issue with regard  
9 to the request was two months later. So, we are excluding  
10 everything from March of 2006 through February of 2010.

11 MS. LARIO: Correct.

12 THE COURT: Okay.

13 MS. LARIO: Yes.

14 THE COURT: So, you want me to count the two months  
15 in 2006.

16 MS. LARIO: Yes.

17 THE COURT: Okay. Go ahead. I am counting.

18 So, two months in 2006, and then we start with 2010.  
19 And in 2010, you had March of 2010. That was when the  
20 district court judge granted the application; right?

21 MS. LARIO: Yes.

22 THE COURT: And then November of 2010, was when UPS  
23 complied -- completed its production.

24 MS. LARIO: Completed the production; correct.

25 THE COURT: So, what time period am I attributing to

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1 EEOC in 2010?

2 MS. LARIO: So, again, Your Honor, I thought that we  
3 were including and not ascribing time period to the time that  
4 we were litigating this issue; correct? Because at that  
5 point, again, while we had litigated that issue, there was  
6 still no information -- no additional information that was  
7 produced or requested with respect to Mr. Abdullah or  
8 Mr. Farhan.

9 THE COURT: Right. So, the point being? What is  
10 your point here?

11 MS. LARIO: Again, the point being, that this time  
12 period should be included from the date that the Western  
13 District orders the production, that should stop the clock on  
14 the litigation of the issue relating to the discovery.

15 THE COURT: Right. I am in agreement with that.

16 MS. LARIO: Okay.

17 THE COURT: Okay.

18 MS. LARIO: So, if we start the clock there.

19 THE COURT: On March of 2010.

20 MS. LARIO: Correct.

21 THE COURT: Okay.

22 MS. LARIO: And move forward to -- for from the  
23 laches argument, we're really looking at going through to the  
24 date of the lawsuit; right?

25 THE COURT: Right. But even within that time -- so,

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1 between March and November, you agree that it was not until  
2 November of 2010, that UPS provided all of the information.

3 MS. LARIO: We provided all of the information on  
4 all of the applicants, and all of the applicants who were  
5 listed as refusing to abide by the appearance guidelines.

6 And just to be clear, that's all it says. There is  
7 a code that the UPS puts into the system when an individual  
8 comes in, applies for the job, and says, I won't abide by your  
9 appearance guidelines. There is no indication whether it's  
10 religion, whether they just didn't want to shave, whether they  
11 had long hair and didn't want to cut it. There is no  
12 indication as to what that rationale is.

13 So, 300 individuals and their names, places and  
14 dates of application were provided to UPS in April of 2010.

15 50 employee requests for accommodation were  
16 provided, along with all the documentation for their requests  
17 for accommodation, April of 2010. The only thing that lapsed  
18 was the issue of personal identifying information, and we  
19 provided that in August of 2010, for the applicants, and in  
20 November of 2010, for the 50 employees.

21 Nothing related to Abdullah, nothing related to  
22 Farhan.

23 THE COURT: So, your point is this time may not --  
24 well. Maybe I should not count it against the commissioner's  
25 charge, but certainly as to the individuals.



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1 MS. LARIO: Correct.

2 THE COURT: Okay.

3 MS. LARIO: And then we have the delay in getting  
4 from the end of November -- let's take the November date,  
5 November 2010, until the issuance of the determination in  
6 June of 2012.

7 So, we have 19 months that passes by for the EEOC to  
8 conduct an investigation, at least as to the broader policy  
9 issues that they were looking into, 19 months.

10 And then we have from the period of the  
11 conciliation, and I'd like to break this down for the Court.

12 The period of conciliation lasted 26 months from  
13 June 29, 2012, the date of the determination and the request  
14 for conciliation, through August 13, 2014, which was the  
15 failure of conciliation.

16 THE COURT: Right.

17 MS. LARIO: If you look at all of the communications  
18 there, there are four critical delays by the EEOC; 26-month  
19 period and, Your Honor, these four periods account for 16 of  
20 those months. During the other times, the correspondence back  
21 and forth between the parties was relatively regular.

22 THE COURT: I went through -- I read the papers and  
23 my math, my calculation, is that there was about a six to  
24 seven-month period when there was no communication where your  
25 offer was outstanding.

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1 MS. LARIO: For where our offer was outstanding?

2 THE COURT: Yes, with no response.

3 MS. LARIO: Yes; correct.

4 THE COURT: So, that is all I count, is six to seven  
5 months within that conciliation period.

6 MS. LARIO: You're right, Your Honor.

7 From July of 2012 to January of 2013 --

8 THE COURT: Right.

9 MS. LARIO: -- the EEOC failed to respond to our  
10 offer.

11 There was another period in 2013, Your Honor, where  
12 the EEOC delayed another three months. We responded on  
13 May 22nd, 2013, and the EEOC's next letter to us wasn't until  
14 August 13 of 2013. So, that's another three-month period  
15 where we were waiting for the EEOC to respond.

16 And there's another five-month gap. On  
17 September 27, 2013, we sent more information and another offer  
18 to the EEOC, and it wasn't until February 27, 2014, five  
19 months later, that the EEOC responded.

20 And then there was another two-month gap between  
21 April 4, 2014, and June 6, 2014, where we didn't hear from the  
22 EEOC.

23 So, when we look at all three of those periods,  
24 which were, again, no explanation for the delay, we didn't  
25 understand what the delay, the EEOC still hasn't explained to

1 this Court the reasons for the delay --

2 THE COURT: But Counsel, to me, when I read the  
3 papers and when I looked at this, as a former investigator, I  
4 understood that once material is produced to you, you then  
5 have to investigate them.

6 So, I didn't appreciate the two or three months  
7 response time to be an unreasonable amount of time, which is  
8 why when I looked at the conciliation period, I did conclude  
9 that that period of time between July of 2012, and January of  
10 2013, when there was no communication, that that was a longer  
11 period of time, and arguably, unreasonable.

12 But not a two, three-month response time between  
13 communications.

14 MS. LARIO: Then I would submit, Your Honor, that  
15 the five-month time period was also equally long because at  
16 this point in time, the parties had kind of, weren't really  
17 providing that much more substantive information. We were  
18 well down the path of discussing our settlement decisions.

19 THE COURT: I have no idea what is going on at that  
20 point.

21 MS. LARIO: Understood.

22 THE COURT: So all I am doing is looking at the fact  
23 that the parties are engaged in trying to resolve the issues,  
24 and so there is back and forth, and obviously, they needed  
25 time to review and consider whatever was being proposed. It

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1 is not just the investigator who is conducting the review. It  
2 has to go up the chain.

3 I am assuming all of this, just based on common  
4 knowledge and practice.

5 MS. LARIO: I don't think that's fair.

6 THE COURT: But Counsel, you cannot ask me to infer  
7 that if a letter with whatever the offer is, is sent to EEOC,  
8 that because EEOC does not reply within a month's time, that  
9 is unreasonable. I cannot draw that inference, knowing the  
10 role of the EEOC, the structure of EEOC, the investigator who  
11 is or whomever you are speaking to cannot make that decision  
12 as to whether or not to accept your offer.

13 So certainly I have to build in some lag time. I  
14 cannot find that if they do not respond within a month's time  
15 that that is unreasonable. Based on what?

16 MS. LARIO: But we are not asking you to do that.  
17 We are asking you to look at a five and a six and a  
18 three-month period to say that's unreasonable.

19 THE COURT: And I said, six or seven months might be  
20 unreasonable, but a month or two is not.

21 I am drawing a line here. I cannot sit here and say  
22 every month where there is no response, that that is  
23 unreasonable. And at the end of day, I am looking at the  
24 totality of the circumstances, and I am going to put it all  
25 together, like you are suggesting.

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1           We are fighting here over a month or two. I do not  
2 think ultimately it is going to make a difference whether it  
3 is an additional two, three, four months, added to my  
4 calculation, versus your calculation.

5           MS. LARIO: I just -- I am troubled by the fact that  
6 the EEOC has done nothing to show this Court what it did  
7 during that time period; why it was too busy to respond in a  
8 five or six-month time period; why it waited three months to  
9 respond. I don't disagree with you, Your Honor, that a 30-day  
10 or a 45-day time period is needed, probably by both parties.

11           But we're not asking you to look at that. We're  
12 asking you to look at the larger gaps that we had in the  
13 conciliation process, and to look at the EEOC's papers here,  
14 and say, EEOC, why didn't you justify this? Why didn't you  
15 come to this Court with averments from the investigator to say  
16 what she was doing, or why it took so long? Because frankly,  
17 it shouldn't have.

18           This was an unreasonable delay, at several points in  
19 this process. And it took too long to go through this  
20 process; and so, respectfully, we believe that putting aside  
21 the one month, the 45-day periods, the EEOC's delay during the  
22 conciliation process totalled 16 months.

23           THE COURT: Okay.

24           MS. LARIO: So, if we include that delay in  
25 conciliation, and then move on to the deliberations that it

1 took to file suit here, we know that it took 11 months until  
2 July 15, 2015, for the EEOC to actually decide to file this  
3 lawsuit. And so again, when we look at that time period, the  
4 EEOC's papers have not provided this Court with any  
5 information that it can consider, other than the trial  
6 attorney's averment, which is not acceptable for this Court to  
7 consider in terms of what was done during that time period.

8 Similarly, during the investigation process and the  
9 conciliation process, there is nothing before this Court that  
10 it can consider to justify any of these time periods.

11 THE COURT: Okay.

12 MS. LARIO: So, as a result, when we're talking now,  
13 and I think boiling down those issues, you have the 16-month  
14 time period during conciliation process; the 11 months for the  
15 determination to file suit; and then you have the 19-month  
16 investigation for the commissioner's charge.

17 And, Your Honor, we still propose that you have to  
18 look back even further for the Farhan and Abdullah charges  
19 because, again, they had the right to file a commissioner's  
20 charge, they didn't. They were prosecuting or processing  
21 individual charges with Mr. Abdullah and Mr. Farhan, and the  
22 time period that they waited between the investigation -- I'm  
23 sorry, between the filing of the charge and this lawsuit are  
24 just outrageous.

25 We're talking about eight, nine years at a time --

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1 THE COURT: Okay.

2 MS. LARIO: -- with those delays and putting aside  
3 the issues of the discovery issues.

4 The discovery issues really boil down to the  
5 commissioner's charge.

6 THE COURT: Okay.

7 MS. LARIO: I guess that's the first prong and the  
8 second prong is prejudice.

9 THE COURT: Sure.

10 MS. LARIO: Here, Your Honor, with respect to the  
11 prejudice to the parties -- to UPS. We know that for Abdullah  
12 and Farhan, our principal witnesses are gone. The individual  
13 that interviewed Mr. Abdullah left the company back in 2010.

14 Mr. Roberson, who was involved in the Farhan charge  
15 and was the HR manager, who managed his accommodations and,  
16 frankly, granted both of the requests for accommodation there,  
17 has retired and long-since retired.

18 THE COURT: But are they unavailable?

19 MS. LARIO: So, Your Honor, we haven't had the  
20 chance yet to look into those issues for purposes of this  
21 motion, and I think that the issue of -- if this Court is  
22 inclined not to grant this motion for laches, we still have,  
23 again, nothing from the EEOC that justifies any of these  
24 delays. Any of the unreasonable delay.

25 And we would like a further opportunity to

1 demonstrate the prejudice that we've had, because 40 percent  
2 of the people that we identified --

3 THE COURT: Counsel, it is your motion. If you are  
4 making the motion, you have to come to court with the  
5 evidence; right?

6 MS. LARIO: We have 40 percent of the people that  
7 were listed as managers, or HR managers who processed either  
8 the applicants or the employee requests for accommodation, are  
9 no longer employed by the company; 40 percent. This is  
10 hundreds of people that we have had.

11 And so we have to investigate that. We have to look  
12 at the specific individuals that were at all of the  
13 facilities, where all of these applicants applied; have to  
14 look at all of the facilities where the individuals went  
15 through the accommodation process. It's a time-consuming  
16 process, and for purposes this motion that was filed a long  
17 time ago, we did not have the opportunity to do a full  
18 investigation of those issues, but we can come to the Court  
19 and tell you that, again, we have significant issues with  
20 respect to witnesses who have left the company.

21 The other issue here is because we are dealing with  
22 circumstance that is happened back in 2005, 2006, 2007, we're  
23 talking about years that have lapsed. And the courts have  
24 taken notice, that when that happens, that passage of time,  
25 memories are automatically going to lapse. And when we're



1 talking about applicants who have applied for employment, or  
2 individuals that have gone through an accommodation process,  
3 that's a long period of time to remember particular details  
4 about those events.

5 So, we certainly are faced, unfortunately, with  
6 those prospects of faded memories.

7 THE COURT: But is it not true, Counsel, that just  
8 as a general matter, witnesses do not remember these things  
9 anyway, and you are using documentation to refresh their  
10 recollection?

11 MS. LARIO: Your Honor, when the EEOC has delays  
12 that are this significant, it is unfair and courts have  
13 recognized it is unfair for companies to be placed in a  
14 circumstance where we can't produce witnesses who have a  
15 memory of what has happened. And cases have been dismissed  
16 where the EEOC has done just that on shorter time periods than  
17 we have here.

18 THE COURT: So, are you suggesting that if, in fact,  
19 they had brought the individual charges, and this case was  
20 litigated three or even four years, because it would have  
21 taken at least that long to litigate as to the individuals,  
22 that the memory that the witnesses would have been able to  
23 recall better?

24 MS. LARIO: Well, we know, for example, if in  
25 November of 2010, if they had made determinations where they

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1 had all of the information, if they made determinations on  
2 Abdullah and Farhan, at that time, we would have had witnesses  
3 available. And we don't now, because they waited another six  
4 years.

5 THE COURT: But even if they had made the decision  
6 then, Counsel, and brought a lawsuit in 2011, how far along  
7 would we be? How much further along than we are here?

8 MS. LARIO: I'm not following.

9 THE COURT: So, your argument is 2010, they had all  
10 of the information, could have made a decision properly.  
11 Assuming it took them two, three months to make a decision. I  
12 do not think you would argue that that would have been prompt.

13 Then that means filing a lawsuit in 2011, a motion  
14 to dismiss, maybe getting past the motion to dismiss, and then  
15 discovery. You're talking 2012, 2013 for those very  
16 witnesses.

17 MS. LARIO: Yes. Again, you're right, still a very  
18 long time to have to wait and to recall the specifics of any  
19 of these individual witnesses.

20 THE COURT: Right. And so my point is, the  
21 difference between had they filed a decision then, and  
22 litigation followed and now, we are talking two, three years.

23 I know, that is not my analysis for purposes of  
24 reaching a decision here. But that is the point that I am  
25 trying to make, based on your argument.

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1           Your argument is had they filed in 2010, then your  
2 witnesses would have been able to better testify about this,  
3 and I am just suggesting there is really not that much of a  
4 difference in the scheme of things.

5           MS. LARIO: You know, I can't speculate what the  
6 difference of five or six years would make. But I can tell  
7 you, Judge, that there clearly would be more witnesses  
8 available to us that there are not now. And that, for  
9 example, in the Abdullah case, we probably would have  
10 witnesses that were still with the company at that time, who  
11 could have at least tried to recall what happened at that  
12 time.

13           So, I think we are in a much different situation and  
14 we are far more prejudiced now than we would have been five  
15 years ago, in both of those individual cases. Absolutely.

16           THE COURT: Okay.

17           EEOC?

18           MS. FOX-SOLOMON: Yes, thanks, Your Honor.

19           I will start with the issue of delay.

20           THE COURT: Why don't you pull the mic over to you,  
21 Counsel.

22           MS. FOX-SOLOMON: Okay.

23           Better?

24           THE COURT: Yes.

25           MS. FOX-SOLOMON: With respect to the issue of

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1 delay, Your Honor, again, I don't want to go through all the  
2 math calculations that we were engaging in, but it is clear  
3 that the longest delay in this case, four-and-a-half years,  
4 was due to defendant's resistance to the EEOC's investigation.

5 As of March 22nd, 2006, the EEOC asked for a  
6 nationwide discovery with respect to applicants and employees  
7 who were denied employment, or an accommodation, based upon a  
8 religious objection to the appearance policy.

9 THE COURT: So, based on UPS's argument, they are  
10 saying that it was not clear you were asking for nationwide  
11 information until you clarified that in August of 2006.

12 MS. FOX-SOLOMON: So, I disagree, Your Honor. If  
13 you look at Exhibit 4 to Counsel's declaration, this is the  
14 March 22nd, 2006, RFI, and we're talking here about requests  
15 seven through nine, where we ask to identify all applicants or  
16 all employees from January 1st, 2004, to present.

17 If you then contrast that with the next request,  
18 that request is specific to UPS facilities in Rochester,  
19 New York. So, we made it very clear that we had some  
20 questions with respect to the Rochester, New York, facility  
21 and then we had other questions with respect to how this  
22 policy was applied nationwide.

23 And then with respect to the clarification in  
24 August 2006, we said your responses are incomplete. You've  
25 limited the information provided to the Rochester facility.

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1 Please provide a response that includes UPS facilities  
2 nationwide.

3 So, I think that that's clearer, because we make it  
4 specific, but I believe that our RFI in March of 2006, was  
5 also clear that we were asking for some information on a  
6 nationwide basis, and other information limited to the  
7 facility at which Mr. Abdullah applied.

8 But even using August 2006, we still have from  
9 August 2006, until November 2010, when we did not have all the  
10 information that we sought. And that is by far the longest  
11 delay in this case.

12 I agree with Counsel that an employer has every  
13 right to challenge a subpoena from the EEOC. We have internal  
14 procedures for doing that, which they followed, but if they  
15 choose to go that course, they cannot then hold that period of  
16 time against the EEOC for purposes of laches, because the  
17 incentive there would be for all employers to obstruct  
18 investigations because then they get the case thrown out at  
19 the end point. So, that is by far the longest delay in this  
20 case and that should not be attributed to the EEOC.

21 Once we got this information in November 2010, there  
22 was a 19-month investigation. I do not think that is  
23 unreasonable given the scope of this case. There were  
24 numerous witnesses that we had to contact. As you might  
25 imagine, much of the contact information was out of date

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1 because we were dealing with people back to 2005, and it's now  
2 2010.

3 THE COURT: So, Counsel, one of the arguments UPS  
4 makes is that there is no information before the Court that I  
5 can rely on. I read, I believe, it is your affidavit; is that  
6 correct?

7 MS. FOX-SOLOMON: Yes, that's correct.

8 THE COURT: I read your affidavit to suggest that  
9 you had some personal knowledge with regard to most of the  
10 procedural matters in this case, but not as to all of them.

11 MS. FOX-SOLOMON: So, Your Honor, I was hired by the  
12 EEOC last July. So in terms of personal knowledge of me  
13 actually being at these proceedings, that attorney has no  
14 retired from the agency.

15 THE COURT: Well, my understanding of the personal  
16 knowledge part is that you have reviewed files and records as  
17 to what happened and when and how.

18 MS. FOX-SOLOMON: That's correct. That was what I  
19 was going to say next, Your Honor.

20 Is that many cases have said that when a Government  
21 attorney reviews official files held by the Government in the  
22 course of their official duties, that satisfies the personal  
23 knowledge requirement of 56E. And so that is what was done in  
24 this case.

25 And the investigator, or the district director, all

1 the various EEOC employees involved in this investigation,  
2 they would have to do the same thing. Our investigator does  
3 not remember that she sent out 300 letters. She would have to  
4 do what I did, is go through and count the letters in the  
5 file. So, anybody is going to have to base their declaration  
6 on a review of the file.

7 If that is not sufficient to this Court, then we  
8 would ask for the opportunity to rectify that by submitting  
9 declarations from all the underlying individuals. But I  
10 submit that that is not required under the case law of this  
11 district, and I have some case cite, if you would like, and  
12 generally, courts accept this information from governmental  
13 agency attorneys, and that's what occurred here.

14 THE COURT: Okay. Please proceed, Counsel.

15 MS. LARIO: Your Honor, I guess with respect to the  
16 personal knowledge issue, there is not any specific record  
17 that's identified in many of the other cases that are out  
18 there that are reported. We see where the EEOC has come  
19 forward with and explained that there were case laws or other  
20 official information that was specifically reviewed, and/or  
21 provided to the Court, and here all we have is a shallow  
22 affirmation from an attorney that has no personal knowledge  
23 and no record of where that information is derived from.

24 So, again, in an important motion such as this, we  
25 would have expected that there would be some justification

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1 from the EEOC, based upon personal knowledge, or some kind of  
2 reflection of a record that would show how many calls were  
3 made; why the investigation took so long; why the conciliation  
4 periods were delayed, which is not even explained in the  
5 record; and why the deliberations to file suit took 11 months,  
6 other than a reference to the EEOC guidebook or handbook.

7 So, here, again, there really are no specifics upon  
8 which the EEOC has given this Court to evaluate the  
9 justification for the delay.

10 THE COURT: Okay.

11 Any other arguments from either side?

12 MS. FOX-SOLOMON: Yes, Your Honor. I just would  
13 like to touch on prejudice, because I didn't have a chance to  
14 do that yet.

15 The cases that Counsel relies on are clearly  
16 distinguishable from this case. The vast majority of those  
17 cases involve situations where the employer was not on notice  
18 promptly of a charge, and so records were destroyed, things  
19 were lost.

20 Here, UPS was on notice of the charge promptly after  
21 each of the individual charges were filed. They knew it was a  
22 nationwide case as of either March 2006, or August 2006,  
23 depending on how, Your Honor, determines. So, they had the  
24 opportunity to preserve and collect records, as well as  
25 testimony from key witnesses, and they did that here.



1           With respect to Mr. Abdullah's charge, we have, I  
2 believe, five certifications from UPS employees  
3 contemporaneous to the time that they made these decisions.

4           As for reasonable accommodations requests, UPS has a  
5 reasonable accommodation tracking system that they mention in  
6 their brief. That is something, again, that there's  
7 documentation to refresh people's recollections with.

8           So, unlike laches cases involving private litigants,  
9 Title VII cases are different. The reason we put employers on  
10 notice promptly is exactly so that they can preserve and  
11 gather this evidence, especially when you have a case of this  
12 scope that is going to take some time.

13           And with respect to turnover of employees. I would  
14 argue that, first, that is not enough. The case law says  
15 turnover itself is not enough. There has to be actual  
16 unavailability of witnesses who would be crucial to UPS's  
17 defense in this case, and I don't believe UPS has met its  
18 burden there.

19           Also, given the volume of interviews, they're  
20 talking about hundreds of thousands of interviews done each  
21 year. It is very unlikely that any individual hiring manager  
22 would remember the specifics of an interview that might last  
23 five minutes. That would be the case whether we sued this  
24 case in 2006, 2007, 2008. That's an issue with the type of  
25 case involved here. It has nothing to do with EEOC delay and

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1 we also have to separate out, well, what portion of faded  
2 memories is due to EEOC delay versus UPS delay. I just don't  
3 believe that UPS has met their burden to establish material,  
4 specific prejudice in this case.

5 In short, Your Honor, dismissal on laches would  
6 reward UPS for their delays in this case, for their  
7 obstruction of the investigation, and it would encourage other  
8 employers to follow this course. So we argue that the just  
9 result in this case is a denial of their motion for summary  
10 judgment.

11 THE COURT: Okay.  
12 Counsel?

13 MS. LARIO: Your Honor, just a brief comment.

14 There was no obstruction of any investigation here.  
15 I think, as the EEOC has even acknowledged, we have the right  
16 and we followed the procedures to properly object to the scope  
17 of the discovery in the investigation period, and there were  
18 reasonable arguments on both sides. Ours was upheld for a  
19 period of two years, until the Second Circuit reversed it.  
20 So, there was no obstruction of the investigation here.

21 I have nothing further on the laches argument.

22 THE COURT: Okay. That leaves us only with the  
23 statute of limitation argument.

24 So, as to the statute of limitation argument, I turn  
25 to the EEOC on this. I do not appreciate why the 300-day

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1 limit does not apply to the EEOC here. I do not get it. Why  
2 is it not applicable?

3 MS. FOX-SOLOMON: Understood, Your Honor. There is  
4 conflicting case law on that issue, as I talk about in the  
5 brief.

6 EEOC's position is that the language of Title VII  
7 says that an aggrieved individual must file a charge with the  
8 EEOC within 300 days of an unlawful employment practice. That  
9 is a statute of limitations with respect to a private  
10 litigant.

11 THE COURT: Right. But that also means that a  
12 private litigant could not possibly bring a suit for anything  
13 prior to that.

14 MS. FOX-SOLOMON: That's correct.

15 THE COURT: And the EEOC is standing in the shoe of  
16 that private litigant when they are suing on behalf of that  
17 private litigant. So how do you get to extend the time limits  
18 simply because you are EEOC?

19 I do not see the equities. I do not see any really  
20 legal support for it. It does not make sense to me that you  
21 would be allowed to extend that time period, so that the  
22 matter could -- so that you could really present evidence  
23 prior to 300 days prior to the filing.

24 Sorry for all the priors, but you understand --

25 MS. FOX-SOLOMON: I understand.

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1 THE COURT: -- what I am saying.

2 MS. FOX-SOLOMON: So, our support for that position  
3 would be the language in Occidental, in General Telephone, the  
4 Supreme Court cases where they talk about, yes, EEOC stands in  
5 the shoes of a litigant when they're arguing on behalf of that  
6 person, but we are not simply a surrogate for a charging  
7 party. Charging parties can go and file their own suits, and  
8 they do.

9 THE COURT: And I agree with all of that, and I  
10 agree that the Supreme Court has said that you have a lot more  
11 flexibility, and that is why you are not bound by the 120-day  
12 rules, and that is why a lot of these rules do not apply to  
13 you. That all makes sense.

14 But it does not make sense that where it is clear  
15 that to start the action, something has to be filed; right?

16 MS. FOX-SOLOMON: Sure.

17 THE COURT: And normally, you bring a lawsuit. You  
18 can file as to action that happened.

19 The statute specifies, or at least and law, because  
20 it is 180 days in some cases; right?

21 MS. FOX-SOLOMON: Right.

22 THE COURT: You can go back to 300 days.

23 Nothing about what the Supreme Court says in  
24 Occidental or any of the other cases, to me, suggests that  
25 there is a legitimate reason for why you should be able to

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1 reach back even further than that. It is not statutory  
2 construction, not case law, nothing. I just did not get it.

3 So, is there anything else that you are relying on  
4 to suggest that the 300-day period does not apply in this  
5 case?

6 MS. FOX-SOLOMON: Sure. Well, the argument we rely  
7 on, Sterling from the Western District, which conflicts with  
8 Bloomberg in the Southern District, obviously, they come to  
9 completely different conclusions in that case. So there's no  
10 controlling law in this circuit on this. But --

11 THE COURT: Or in any circuit.

12 MS. FOX-SOLOMON: Or in any circuit, that's correct.

13 Most of these cases come up in the context of 707  
14 pattern or practices. So there's just not a lot of case law  
15 about how this applies to 706, which is what we have here.

16 THE COURT: And you will admit that there is a  
17 difference between the two.

18 MS. FOX-SOLOMON: Yes, yes, in terms of how we  
19 litigate the cases, sure.

20 My argument would be, and I will move on quickly,  
21 because I think, in this case, it doesn't really matter  
22 because the 300 days, if we measure it back from Abdullah's  
23 charge, where that covers the scope of our lawsuit, but the  
24 argument is that if the EEOC is not bound by an individual  
25 charge in terms of the claims it can pursue, and that's

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1 well-settled, we're only bound by the scope of our reasonable  
2 investigation into the charge.

3 So, the argument is, if it's the scope of our  
4 reasonable investigation that determines what claims we can  
5 litigate in the case, shouldn't it be the scope of our  
6 reasonable investigation that governs the time period of the  
7 case.

8 THE COURT: But isn't the issue here notice to the  
9 employer? And wouldn't the concern be that an employer  
10 expects and knows that once a charge is filed, that the  
11 activity that they could be sued for goes back 300 days,  
12 without any notice to the employee, why should EEOC be allowed  
13 to go back even further?

14 And isn't that prejudicial to an employer to not  
15 know when a suit is brought, that, in fact, EEOC may go back  
16 two years, or even three years, into activity that they, based  
17 on the statute and case law, would have no reason to believe  
18 that would be the subject of an EEOC investigation or suit?

19 MS. FOX-SOLOMON: So, with respect to notice. The  
20 charge in this case, as soon as we filed an RFI with respect  
21 to Abdullah, we asked for information going back two years, to  
22 January 1st, 2014. So, that's the basis of why we use that  
23 date in the lawsuit.

24 THE COURT: January 1st, 2004.

25 MS. FOX-SOLOMON: 2004, you're right, 2004.

1           So, the employer was on notice that that was the  
2 period of interest, and the reason we do that two years back  
3 is the language in Title VII that limits back-pay claims to  
4 two years prior to the charge. So, the other argument is why  
5 would we need that limitation of two years on back pay if EEOC  
6 couldn't reach back to earlier than the 300-day charge filing  
7 period. So, that's the period of time that UPS was on notice  
8 we were looking into, and so that's the period of time used in  
9 the lawsuit.

10           But here, as I said, it doesn't really matter  
11 because the 300 days, if it applies to the EEOC, is measured  
12 from the triggering charge, which would be Bilal Abdullah  
13 charge, which would bring us back to March 19th, 2011.

14           THE COURT: Okay.

15           Counsel?

16           MS. LARIO: Your Honor, this complaint is a Section  
17 706 claim. It is being brought by the EEOC on behalf of an  
18 individual. It is not a Section 707 pattern and practice  
19 claim. Many I think, of the cases that the EEOC cites, are  
20 the pattern and practice kinds of cases where there might be a  
21 little bit more ambiguity on the law.

22           But let's be clear. Title VII, Section 706, is the  
23 one that has the 300-day charged filing period in it. There  
24 is no excuse for the EEOC to be arguing to the contrary and,  
25 indeed, in the Southern District of New York, they admitted

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1 that they were bound by that charged filing period.

2 So, how they're saying or arguing something  
3 different here just doesn't make sense with respect to that.

4 THE COURT: So, I am in agreement with you on that,  
5 Counsel, that they are limited by the 300-day.

6 The question is does the 300-day limit, based on the  
7 Abdullah charge, cover all of the charges here, or as you were  
8 articulating to me, it's only 300-day back for each so that  
9 Abdullah and Farhan have separate time periods covered here,  
10 not as EEOC argues that it should be the time period dating  
11 from the Abdullah charge.

12 MS. LARIO: Right.

13 So, the 300 period day, as you've indicated, where  
14 there isn't an individual charge, it has to be where the  
15 employer is on notice. And in connection with this case, I  
16 think what, again, is compelling here is that every employer  
17 that responds to charges of discrimination, individual charges  
18 of discrimination, does not anticipate that their case is  
19 going to be a nationwide case.

20 In this case, in fact, then we objected and we  
21 objected properly, and it wasn't until later, until after the  
22 commissioner's charge was filed -- and clearly, the  
23 commissioner's charge was filed, as the EEOC acknowledges,  
24 because there was uncertainty as to whether they were going to  
25 get nationwide discovery in the Farhan and Abdullah cases.



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1 THE COURT: Right, but as to notice when they issued  
2 the RFI, you knew then that they were asking for nationwide  
3 disclosure.

4 MS. LARIO: But that was in dispute, and we didn't  
5 necessarily know, or understand.

6 THE COURT: You did not agree with it. But there is  
7 no dispute that is what they were seeking.

8 MS. LARIO: But then what about the two years that  
9 we were in the right? The two years that the Western District  
10 held that our position was the correct position, until later  
11 that was reversed on appeal.

12 THE COURT: That might go to the laches argument,  
13 but here we are talking about statute of limitation.

14 The question is, when should the clock start to run?  
15 Is it 300 days before the filing of the Abdullah charge, or  
16 the for everything? Or only as to Abdullah, and then 300 days  
17 before the Farhan charge for him? And then 300 days before  
18 the commissioner's charge for that?

19 MS. LARIO: So, I guess I am going to rely upon  
20 Judge Prescott's decision in the Bloomberg case.

21 THE COURT: Okay.

22 MS. LARIO: 967 F.Supp.2d 802 case, Southern  
23 District 2013.

24 There she talked about the differences between  
25 Section 707 and 706 claims and said clearly in that case, that

1 the EEOC is obligated to go through the pre-litigation  
2 requirements for a 706 claim; right? Different than what  
3 their pre-litigation requirements are for a 707 claim.

4 While we may have been on notice of a broad  
5 policy-based 707 claim back then, we were not on notice that  
6 they would file solely a 706 claim. That, we didn't have.  
7 And respectfully --

8 THE COURT: But does it matter which claim they are  
9 going to file ultimately? Isn't the issue are you on notice  
10 that they are investigating a nationwide practice, as opposed  
11 to the individual practice?

12 MS. LARIO: So, again, you know, Judge Prescott said  
13 you can't use 707 to get a backdoor to 706, and you can't use  
14 that as any of the pre-litigation requirements; whether it's  
15 notice, whether it's investigation, conciliation,  
16 determination.

17 We weren't on notice of a 706 claim until they filed  
18 this lawsuit. That's it. We didn't know. It wasn't --  
19 that's not the way to handle the investigation or any of the  
20 prior allegations. This has always been previously done  
21 separately.

22 So, we don't believe that they went through that  
23 process and gave us notice that they were ever going to bring  
24 a 706 claim. So, we say, even in the charge itself, it really  
25 isn't clear. It really wasn't clear until the litigation.

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1 But clearly, because of that, the Abdullah, the Farhan  
2 charges, can't be used.

3 The subpoena, the RFIs can't and shouldn't be used  
4 to place us on notice, because we weren't on notice that they  
5 were going to bring these individual claims at this point.

6 THE COURT: I guess I am having a hard time reaching  
7 that conclusion. I think if it was the other way around, it  
8 would make more sense in my head; but the fact that you were  
9 on notice as of the RFI, or at least as of the clarification  
10 in August of 2006, certainly as of the subpoena, that EEOC is  
11 looking at the practice of UPS nationwide.

12 MS. LARIO: What you just said is right; they were  
13 looking at the practice. They were not looking at a 706 claim  
14 on behalf of individuals --

15 THE COURT: Understood.

16 MS. LARIO: -- around the country.

17 THE COURT: But looking at all of it nationwide, and  
18 then deciding only to bring as to some of it, you got notice.  
19 If it was the other way around, where they were only  
20 investigating the individual claims, and then ultimately  
21 brought a nationwide practice claim, then I think you would  
22 have a stronger argument.

23 But I do not see the inequities in your favor here  
24 on that issue. And I would not count it from the date of the  
25 filing in a Farhan, obviously, because at that point all you

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1 know is this individual claim. But I think once it is made  
2 clear to you that it is a national investigation, then you  
3 have received any notice that would be due that, in fact, they  
4 are looking at the practice with regard to all employees,  
5 potential employees of UPS.

6 And so, I come out the other way on that --

7 MS. LARIO: I just want to --

8 THE COURT: -- in my mind.

9 Go ahead, Counsel.

10 MS. LARIO: Your Honor, I hear what you're saying.  
11 I just want to read a quote from that Bloomberg case. I think  
12 it's at page 813.

13 THE COURT: Slow down.

14 MS. LARIO: "Title VII does not allow the EEOC to  
15 use class-wide claims to conduct an end-run around the  
16 pre-litigation requirements that must be satisfied before  
17 bringing suit on behalf of individual claimants under 706."

18 THE COURT: But what pre-litigation requirements do  
19 you believe they did not engage in here?

20 MS. LARIO: The investigation, the conciliation, and  
21 the determination.

22 We never had an opportunity to talk specifically  
23 about individuals. In fact, when we attempted to do that  
24 during conciliation, we were met with no response whatsoever.

25 THE COURT: Again, doesn't that go to your laches

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1 argument, though, not to the statute of limitation?

2 I mean, why does that affect the statute of  
3 limitations?

4 MS. LARIO: I just, because this starts at the  
5 beginning. It starts at the beginning of the charge. It  
6 starts at the beginning of the charge that we're at issue  
7 here. And again, while we were on notice of some kind of  
8 class claim, we were not on notice that this was somehow going  
9 to turn into a 706 claim until much later.

10 And I see that you don't understand my argument or  
11 don't accept it, but I think --

12 THE COURT: I understand it. I just do not find it  
13 as persuasive.

14 Go ahead.

15 MS. LARIO: The reasoning of Bloomberg, to me,  
16 solidified the fact that we had the right to be placed on  
17 notice that they were going to be bringing individual charges  
18 and we didn't know that even through the conciliation process  
19 in this case. We didn't anticipate that in this case.

20 THE COURT: But you did not just think they would  
21 walk away from the Farhan and the Abdullah charges.

22 MS. LARIO: No, Your Honor.

23 And again, I think those individuals were the only  
24 individuals, because they had their own charges that were out  
25 there. But with respect to anyone that is unnamed, that there

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1 was no indication by the EEOC that they abided by their  
2 obligations, and therefore, placed us on notice, that at some  
3 point they were going to bring a 706 claim against UPS.

4 THE COURT: Okay.

5 Anything further, Counsel?

6 MS. FOX-SOLOMON: Yes.

7 Your Honor, I don't really understand the 707 versus  
8 706 argument.

9 First of all, it's a brand-new argument that is not  
10 in the main brief or the reply brief. I have never heard  
11 Counsel articulate that they thought we were pursuing a 707  
12 and now it's a 706.

13 The 707 versus 706 has nothing to do with notice to  
14 the employer. Charges never say 706, 707. That has to do  
15 with litigation. The charge says here's the statute that was  
16 violated, and here's the person and time period at issue.

17 THE COURT: I think I understand Counsel's argument  
18 to be, look, the way you conducted the litigation, to the  
19 extent you were planning to bring these individual charges,  
20 they should have been brought earlier, but you conducted it in  
21 such a manner as if you were looking for pattern or practice,  
22 and then you are turned around and brought this; did I get  
23 that right, Counsel?

24 MS. LARIO: Correct, Your Honor, thank you.

25 THE COURT: Okay.

1 MS. FOX-SOLOMON: Well, it's still a practice that  
2 we're dealing with here. It's a class case. It's a class  
3 case on behalf of the named individuals, Farhan and Abdullah,  
4 and similarly aggrieved individuals, based upon UPS's  
5 practice. We're not using our 707 pattern or practice  
6 authority. That's a separate issue.

7 But the way we investigated the case is the same,  
8 regardless of which suit authority we used here. We always  
9 said we were interested in Mr. Farhan hand and Mr. Abdullah,  
10 and then the commissioner's charge also clarified, as we said  
11 beginning in March 2006, we're looking at a class of  
12 applicants and employees. So, UPS was on notice of that scope  
13 in March 2006.

14 And Bloomberg does not support Defense Counsel's  
15 argument. Bloomberg does say 706, 707. Regardless, 300 days  
16 applies. That's what Bloomberg says. But Bloomberg says,  
17 it's measured from the earliest filed charge, which it then  
18 refers to as the triggering charge. And here the earliest  
19 filed charge is Mr. Abdullah's charge.

20 Even the cases that Defense Counsel cites in her  
21 reply brief, she cites several lower court cases from the  
22 third and fourth circuits. Those cases say the date should be  
23 measured from the date that the employer was on notice of the  
24 expended investigation.

25 I would argue those cases don't apply here because

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1 those cases involved a situation where the individual charging  
2 party says sex discrimination, and then the EEOC looked into  
3 it and said, oh, it's not just sex discrimination, it's also  
4 race discrimination, or disability discrimination. So the  
5 Court says it's unfair in those situations because the  
6 employer was not on notice of the statute and the claims at  
7 issue.

8 So, for those cases, they say it should be measured  
9 from the date the EEOC provided notice of the expanded  
10 investigation.

11 THE COURT: But why wouldn't that apply here,  
12 though? I mean, even though the expansion of your  
13 investigation is that you are looking at more than Abdullah,  
14 but still the same religious discrimination claims.

15 MS. FOX-SOLOMON: Right. It's still the same  
16 charge.

17 THE COURT: Yes.

18 MS. FOX-SOLOMON: It's still the same practice.

19 THE COURT: But UPS would not know until they are  
20 notified that you are looking beyond Abdullah; right?

21 MS. FOX-SOLOMON: So, if that's what we're using, if  
22 we're looking using the date of the notice of the expanded  
23 investigation as opposed to Bloomberg, then that date would be  
24 March 2006, when our RFI requested nationwide discovery.

25 THE COURT: Okay.



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1           Okay. So, I am just going to tell you what is left  
2 and then what I am going to do and we will break for ten  
3 minutes.

4           Okay. So, the last issue left is this segregation  
5 argument that EEOC is making, that, for the life of me, try as  
6 I did, I could not get it, Counsel. So, you have your work  
7 cut out for you to explain to me why there is a segregation  
8 charge here that provides for a continuing violation argument.

9           And then, I am actually going to render my decision  
10 today, okay? So we are going to take a ten-minute break.

11           MS. FOX-SOLOMON: Actually, Your Honor, may I add  
12 just one thing about that argument? I might be able to save  
13 some time.

14           It depends when Your Honor decides to measure the  
15 300 days from. If the 300 days is measured from either  
16 January 2006, of the Abdullah charge, or March 2006, when we  
17 provided the notice, then that argument really is unnecessary  
18 because we're --

19           THE COURT: I want to hear that argument, because  
20 you made it, and I read it, and I am confused by it and it is  
21 it's your job to educate the Court.

22           MS. FOX-SOLOMON: Okay. Will do. Thank you, Your  
23 Honor.

24           THE COURT: So we will take a ten-minute break.

25           (Recess taken at 11:59 a.m.)

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1 (In open court.)

2 (Judge MARGO K. BRODIE enters the courtroom.)

3 THE COURTROOM DEPUTY: All rise.

4 THE COURT: Please be seated.

5 So, Counsel, I did not mean to be flip with you.

6 Are you withdrawing your segregation charge?

7 MS. FOX-SOLOMON: No, we are not.

8 THE COURT: Okay. So then why don't you tell me  
9 what that charge is.

10 MS. FOX-SOLOMON: Sure.

11 So the segregation claim in this case is that UPS,  
12 over time, has channelled individuals whose religion conflicts  
13 with the appearance policy into nonsupervisory,  
14 back-of-the-facility, noncustomer contact positions. And this  
15 is done by channelling people at hire into those positions.  
16 That's what we allege occurred with Mr. Abdullah here.  
17 Mr. Abdullah was applying for a driver-helper position.

18 THE COURT: I understand the factual basis for the  
19 argument. I do not understand why it is a continuous or  
20 continuing violation.

21 MS. FOX-SOLOMON: So the argument is that  
22 segregation is more than the sum of its parts. It may start  
23 on the day that you're hired into a back-of-the-facility  
24 position, but it continues when, based on that initial  
25 classification, you are denied upward mobility into jobs that

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1 are paid more.

2 THE COURT: So, is it a segregation claim as to each  
3 individual?

4 MS. FOX-SOLOMON: I mean, it's a class claim.

5 THE COURT: I understood that part. But I guess --  
6 so in my mind, when you are talking about a continuous claim,  
7 for example, a hostile work environment; right?

8 MS. FOX-SOLOMON: Sure.

9 THE COURT: And so the law for that is it must be  
10 severe or pervasive.

11 MS. FOX-SOLOMON: Right.

12 THE COURT: Here, is the argument that this group,  
13 this particular group of individuals, was created by UPS in  
14 that they were not being hired, they were not being promoted,  
15 and all of those things, but those are discrete actions.

16 MS. FOX-SOLOMON: Right.

17 THE COURT: So, how do you get them from there to  
18 some form of continuing activity? Is it that because UPS does  
19 this continuously? Because that cannot be it; right?

20 MS. FOX-SOLOMON: No, no.

21 THE COURT: So, I am not understanding the legal  
22 basis for why you believe that the segregation claim, this  
23 claim, is a continuous violation instead of just each act that  
24 UPS did that was problematic, which should be challenged  
25 individually.

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1 MS. FOX-SOLOMON: Right. And that's what our other  
2 three claims are. It's exactly that.

3 We agree that failure to hire, failure to promote,  
4 denial of reasonable accommodation, those are discrete acts.

5 The argument with the job segregation claim is that  
6 it's ongoing and cumulative in nature on an individual basis.  
7 So, to take the Abdullah example, he applied for a  
8 driver-helper position, he alleges that he was told you need  
9 to shave your beard. When he disclosed he was a Muslim, they  
10 said, okay, why don't you apply for a package handler  
11 position, because there's no customer contact and the policy  
12 doesn't apply.

13 So, he wasn't hired at all. But had he been hired,  
14 the argument would be that that segregation claim is not just  
15 the initial channeling into that position, but the fact that  
16 his opportunities for advancement on an ongoing basis were  
17 limited that that initial action.

18 THE COURT: But what is the legal support for that  
19 type of claim?

20 MS. FOX-SOLOMON: So the legal support is the  
21 harassment allegations that it's a similar concept where it's  
22 ongoing -- ongoing indignities that add up to something more  
23 than just the acts of harassment or name calling; that it's  
24 more than the sum of its parts.

25 There is no case that deals with Abdullah. There's

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1 not a lot of job segregation cases out there. There are some  
2 that recognize the claim. This issue has not, at least my  
3 research, did not disclose any cases that specifically dealt  
4 with job segregation, the continuing violation in Title VII.

5 The most analogous case I could find was in the  
6 housing discrimination avenue, which made a similar argument  
7 on the basis of race; that steering practices, it might be a  
8 denial of credit. It might be showing people houses in a  
9 certain neighborhood. Those are discrete acts, but the  
10 greater issue is what happens when all those things are put  
11 together, and then you have neighborhoods separated on the  
12 basis of race.

13 THE COURT: There is the difference.

14 So, I think in that situation, ultimately, you see  
15 the impact and there is a segregation that you are pointing  
16 to; right? Which is more than the individual activities.

17 Here there are no such allegations; right? In fact,  
18 there is nothing that suggests the individual employees who  
19 were denied promotions, or whatever, even knew of or  
20 commiserated with, or ended up in this environment -- it does  
21 not have to be physical, but somehow had the same stigma  
22 attached, or all of those things that go with the housing  
23 discrimination claim that you just discussed.

24 MS. FOX-SOLOMON: I see.

25 THE COURT: So it does not quite fit. I could see

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1 where maybe it could fit in the right circumstances, in the  
2 right set of facts, but it does not fit here in my mind, not  
3 based on the allegations in the complaint.

4 MS. FOX-SOLOMON: I think the closest would be  
5 Mr. Farhan's allegations, because that is something that he  
6 has talked about and that he talked about in his charge, and  
7 in his interviews, is the concept of, you know, with him, it  
8 was other Muslim employees. The concept that if you have a  
9 beard, you're going to be stuck in these back-of-the-facility  
10 positions, and it affects lots of other religions, but the  
11 viewpoint that, if you have a beard and the beard is based on  
12 religious objections, that you are not going to be able to be  
13 a supervisor. You are not going to be able to be a driver.  
14 You are going to be sorting packages in the back of the  
15 facility.

16 So to that extent, I think, there is not as great of  
17 a stigma clearly as in the housing discrimination context with  
18 segregation, but it's the same concept that, over time, you  
19 have a work force that is divided. In this case, based upon  
20 religion.

21 THE COURT: Got it. Okay.

22 MS. LARIO: I don't know how the EEOC makes this  
23 argument when every one of the 50 accommodations that we  
24 provided to them was granted. Every one, including  
25 Mr. Farhan's.

1           He was granted an accommodation to drive with a  
2 beard. He was granted accommodation to go on a six-month  
3 Hajj. Every single one. There is absolutely no basis, in  
4 fact, for this argument. I understand it's a pleading, but  
5 there is no basis, as we sit here today, to even make that  
6 argument.

7           I agree with you, Your Honor, that the segregation  
8 claim is predicated completely and solely on discrete acts.  
9 In fact, if we look at the complaint itself, on pages 10 and  
10 11, they talk about the segregation allegation and the  
11 examples that they give are, a transfer to a different  
12 position; a failure to accommodate; a delayed accommodation;  
13 and a failure to hire. Those are all discrete acts. And  
14 those are not subject to the continuing violation.

15           And one other point I'd like to make. To the extent  
16 the EEOC is using the continuing violation doctrine to revive  
17 any kind of stale claimants, as opposed to stale claims,  
18 that's not the purpose of the doctrine, and it is not allowed  
19 to be used in that manner.

20           So, when we have discrete acts that are outside of  
21 the statute of limitations, they can't be pulled in by the  
22 banner of segregation, because that just doesn't exist and  
23 they've made no pleading to suggest otherwise.

24           THE COURT: Okay.

25           Okay. So I have heard a lot of arguments today. I

1 have read all of the motion papers, and I have also read the  
2 complaint. I am going to render an oral decision here. I  
3 want to make it as understandable as possible.

4 I will have a written decision, but I am going to  
5 deal with each issue in the manner in which we have discussed  
6 them.

7 So, beginning with the first. First, let me just  
8 state for the record that summary judgment is proper only when  
9 construing the evidence in the light most favorable to the  
10 nonmovant. There is no genuine dispute as to any material  
11 fact, and the movant is entitled to judgment as a matter of  
12 law.

13 That is Federal Rule of Civil Procedure 56(a).

14 A movant for summary judgment always bears the  
15 burden of production as to every element of an affirmative  
16 defense. FDIC versus Giam Metei, 34 F.3d 51 page 54  
17 Second Circuit, 1994, and I am not including the citations.

18 So, turning to the first affirmative defense,  
19 whether or not the EEOC made a prompt determination of the  
20 underlying charges, I am not going to reiterate the parties'  
21 position, or the discussion we had today. But my ruling is  
22 that this is not, this defense has not been proved here.

23 Neither Title VII, nor the courts require the EEOC  
24 to complete its investigation within a particular period of  
25 time. The parties are all in agreement as to that.



1           See Occidental Life Insurance Company of California  
2 versus EEOC, 432 U.S. 355 page 369, footnote 23, 1977 Supreme  
3 Court.

4           Defendant's exhibits here demonstrate that the  
5 parties were litigating and negotiating the scope of discovery  
6 in the Abdullah charge until November of 2010.

7           While the Farhan charge was filed in April of 2007,  
8 Farhan's allegations that UPS engaged in a pattern or practice  
9 of refusing to accommodate the religious observances,  
10 practices and beliefs of its employees, suggest that the  
11 EEOC's discovery after both Abdullah and Farhan charges, and  
12 until and after the commissioner's charge, was part of an  
13 ongoing investigation over which both the Supreme Court and  
14 the Second Circuits have given EEOC great latitude.

15           Declining to decide as a matter of law that the EEOC  
16 did not satisfy its pre-suited requirement to make a  
17 determination as promptly as possible, quoting promptly as  
18 possible, 42 U.S.C. Section 2000e-5 is consistent with the  
19 Second Circuit's determination that limited review respects  
20 the expansive discretion that Title VII gives to the EEOC  
21 while ensuring that the commissioner follows the law.

22           And that is Sterling Jewelers, I quoted part of that  
23 from there, 801 F.3d 96 at page 101, quoting Mach Mining.

24           Moreover, it is defendant's burden to prove that  
25 there is no genuine issue of material fact that plaintiff

1 failed to make a prompt determination, pursuant to Section  
2 2000e-5, and defendant has not met that burden this view of  
3 one, defendant's own role in prolonging the investigation, as  
4 is defendant's right to object to the scope of the  
5 investigation, and defendant did that here;

6 Number two, facts that tend to show that plaintiff  
7 investigated a potential nationwide claim;

8 And three, defendant's inability to point to any  
9 legal authority regarding what constitutes a prompt  
10 determination in this context.

11 So, with regard to defendant's objection to the  
12 Fox-Solomon affidavit, based on both the substance and the  
13 form of the affidavit, it is not clear to me that the  
14 declaration is not based on her personal knowledge. The test  
15 of admissibility is whether a reasonable trier of fact could  
16 believe the witness had personal knowledge of the facts to  
17 which she is testifying.

18 Fox-Solomon states in her declaration that she is  
19 fully familiar with the facts asserted in the declaration.  
20 Even looking at the declaration itself, and excluding the  
21 items that possibly she could not have any personal knowledge  
22 of, the Court's ruling is the same.

23 And there were certain parts of the Fox-Solomon  
24 affidavit that I did exclude from consideration, including the  
25 information regarding why the Buffalo office took 18 months to

1 complete its investigation of the three charges at issue.

2           So, turning to the laches affirmative defense. This  
3 one, clearly, we had strenuous discussion about it. As I  
4 indicated before, because it is an affirmative defense, the  
5 party is asserting it bears an ultimate burden of persuasion,  
6 and that's citing Pecorino versus Vutec Corp., 6 F.Supp. 3d  
7 217, Eastern District of New York 2013.

8           And even where the factors of undo delay and  
9 prejudice are met, whether to apply the equitable remedy of  
10 laches lies in the sound discretion of the Court, relying on  
11 the same case.

12           To prove laches, a party must establish:

13           One, the plaintiff knew of the defendant's  
14 misconduct;

15           Two, the plaintiff inexcusably delayed in taking  
16 action;

17           And three, the defendant was prejudiced by that  
18 delay.

19           Quoting Allens Creek/Corbetts Glen Preservation  
20 Group, Inc., versus West, 2 F.App'x 162 page 164  
21 Second Circuit 2001 and the Second Circuit was quoting a  
22 reported case.

23           Addressing each factor. With regard to the first,  
24 where the plaintiff knew of defendant's misconduct, although  
25 the Second Circuit has not considered the defense of laches in

1 the context of an enforcement suit by the EEOC, its laches  
2 jurisprudence, generally, and in Title VII cases by private  
3 plaintiffs, reflects a principle also reflected in the other  
4 circuits that laches can only apply after plaintiff knows of  
5 its right to bring suit in view of a defendant's misconduct.  
6 See Brennan versus Nassau County 352 F.3d 60 page 64.

7 Here, defendant has not presented any evidence or  
8 even argued that plaintiff knew of its alleged misconduct, or  
9 in any event, the scope of the alleged misconduct, prior to  
10 the close of discovery in November of 2010.

11 So, the Court can identify November of 2010, as the  
12 beginning of the applicable laches period, as the parties  
13 discussed at length today. Since the record reflects no point  
14 before that which plaintiff could reasonably have known of  
15 defendant's misconduct, having not been able to contact other  
16 class members until it had been given their identifying  
17 information.

18 Turning to the second element, whether or not  
19 plaintiff inexcusably delayed taking action here. I am not  
20 going to go over the parties' arguments again, but construing  
21 all the facts and drawing all the reasonable inferences in  
22 plaintiff's favor, as I am required to on a motion for summary  
23 judgment, the only periods of delay that I find are reasonably  
24 attributable to plaintiff are:

25 One, from November 2010, until the determination in

1 June of 2012;

2 And two, from the end of the conciliation in  
3 August 2014, until the filing of the suit in July 2015.

4 Moreover, even disregarding Ms. Fox-Solomon's  
5 declaration, which evidences that plaintiff did take  
6 significant steps toward investigating the claims between  
7 November 2010, and June 2012, defendant has not met its burden  
8 to prove that the time delays amounting to approximately  
9 two-and-a-half years, are unreasonable or inexcusable.

10 See Springer versus Partners in Care, 17 F.Supp. 2d,  
11 133 page 138 EDNY 1998.

12 Noting that on summary judgment, or a motion to  
13 dismiss, the absence of evidence indicating what efforts the  
14 plaintiff took to pursue his claim, cannot lead to the  
15 conclusion that the plaintiffs simply did nothing for an  
16 extended period of time.

17 Further, in view of the steps that must be followed  
18 before the EEOC may file suit, an 11-month period between the  
19 end of conciliation, and the filing of suit, is not  
20 unreasonable as a matter of law.

21 And I looked at the EEOC's policy requirement which  
22 are available online.

23 The cases that defendants rely on do not provide a  
24 contrary result here. Many of these cases demonstrate that  
25 outside of the Second Circuit Court of Appeals, these courts

1 consider inexcusable delay on specific facts of each case, but  
2 heavily consider any delay and:

3           One, in one notifying the defendant of the charges;  
4           Or two, beginning an investigation after receipt of  
5 a charge; neither of which is relevant here.

6           Turning to the third factor, whether defendant was  
7 prejudiced by the delay. Mere delay without more does not  
8 amount to laches. The defendant must establish with such  
9 clarity as to leave no room for controversy; that it has been  
10 substantially and unduly prejudiced in its ability to defend  
11 the lawsuit because of the EEOC's delay.

12           Quoting EEOC versus Westinghouse Electric Corp.,  
13 592 F.2d 484 page 486, which, in turn, was quoting an  
14 Eighth Circuit EEOC case.

15           So, defendant's arguments that the witness's  
16 memories have faded; that changes in personnel will make it  
17 difficult to locate witnesses; and that the volume of  
18 applications since the relevant events will make it difficult  
19 to defend the case, these are the arguments made by defendant,  
20 but defendant has not produced evidence of any of these  
21 allegations, except as contained in Ms. Caldwell's  
22 certification, who is defendant's corporate director of talent  
23 acquisition, which was submitted with a reply brief.

24           The Caldwell certification notes that, "each UPS  
25 interviewer generally conducts hundreds of interviews each

1 peak season"; that the initial personnel in charge of  
2 interviewing or supervising Abdullah and Farhan no longer work  
3 at UPS, and that "about 40 percent of the managers involved in  
4 addressing the religious accommodation requests of the  
5 employees who went through the UPS accommodation process are  
6 no longer employed by UPS."

7           Given this is the only evidence of prejudice,  
8 defendant has not met its burden to prove that EEOC delays  
9 have caused specific prejudice to its ability to defend the  
10 case.

11           Turning to the third affirmative defense, the  
12 statute of limitations. We've gone back and forth on this. I  
13 believe my view on this is clear, that the EEOC, contrary to  
14 its claim, cannot go back beyond 300 days before the filing of  
15 the charge.

16           The real issue here is whether or not all of the  
17 charges can relate back to that date, as EEOC argues, or  
18 whether or not each relates back only to 300 days prior to  
19 that particular charge.

20           As the parties acknowledge, there is no clear law on  
21 this point. There are no Appellate Court decisions and few  
22 scattered District Court decisions that address how an  
23 expanded investigation affects the triggering chart for the  
24 purposes of the 300-day time bar.

25           The few courts that have considered the issue, have

1 concluded that the relevant date for limitations is the date  
2 that EEOC provided notice to the employer that the  
3 investigation has been expanded.

4           Here, so the question is whether or not the relevant  
5 date would be the March 22nd, 2006, date for when EEOC made  
6 their request for information, where that request included  
7 nationwide responses, or at least requested nationwide  
8 responses, or whether it is the 300 days prior to the  
9 April 25, 2007, date, which is the Farhan charge, the date of  
10 the filing of the Farhan charge, which specifies pattern or  
11 practice.

12           In view of the fact that the issue here is when was  
13 the defendant notified that, in fact, it was a nationwide  
14 discovery request, or that the EEOC was conducting a  
15 nationwide investigation, which brings the triggering date to  
16 either March 22nd, 2006, when the request was made, or when it  
17 was subsequently clarified in August of 2006. Not much of a  
18 difference between the two dates.

19           The only question, in my mind, is whether the  
20 initial request was clear enough, which it sounds like it was,  
21 since it specified only responses from Rochester with regard  
22 to some requests, and generally all suggesting nationwide. I  
23 do not know that I need to make a ruling as to that  
24 specifically. I do not know that it makes a difference in the  
25 context of the litigation, whether it's March or August, but



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1 it really would require me to go back and re-read the request  
2 that was made in March of 2006, to see if that was sufficient  
3 notice for EEOC to be aware that for -- I am sorry, for UPS to  
4 be aware that EEOC was conducting a broader investigation, a  
5 nationwide investigation, or whether that was not clear until  
6 it was clarified in August.

7 So, my decision as to which of the two days depends  
8 on when that was clear to UPS, and I will go back and read the  
9 document, the RFI, from March of 2006, to see if that  
10 clarifies.

11 I believe that has taken care of all of the issues.  
12 As to the segregation claim of a continuing violation, as I am  
13 sure EEOC understood from my questions, I do not believe that,  
14 to the extent such a claim exists, it certainly does not exist  
15 here in this case, meaning, there is no continuous violation  
16 that has been alleged in the complaint. The complaint only  
17 alleges discrete activities.

18 Did I forget anything?

19 MS. CURTIN: No, Your Honor.

20 MS. FOX-SOLOMON: No.

21 MS. LARIO: No, Your Honor.

22 THE COURT: Okay.

23 Where do we go from here?

24 MS. FOX-SOLOMON: I guess initial conference; right?

25 MS. LARIO: Yes.

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1 MS. FOX-SOLOMON: We postponed the initial  
2 conference with the magistrate judge.

3 THE COURT: Okay. So, the magistrate judge in this  
4 case is whom?

5 MS. FOX-SOLOMON: Judge Pollak.

6 THE COURT: Judge Pollak, yes.

7 Okay. So the parties should meet with her. Either  
8 someone should call her and reschedule the initial conference  
9 so that you can move forward. I will look at that one  
10 document and issue a short order as to my decision on that one  
11 issue.

12 I thank the parties for their arguments today. I  
13 could not have done this without the vigorous input from both  
14 sides. It is always appreciated, at least I certainly  
15 appreciate, hearing from the parties. It helps me better  
16 decide the issue before me.

17 MS. LARIO: Thank you, Your Honor.

18 MS. FOX-SOLOMON: Thank you, Your Honor.

19 MS. CURTIN: Thank you.

20 MS. FOX-SOLOMON: We appreciate it.

21 THE COURT: Have a good day.

22 ALL: Thank you.

23 (Matter concluded.)

24 ooo0ooo

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VB OCR CRR